

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Proceeding to review Rider 4, Gas Cost, pursuant	)	
to Section 9-244(c) of the Public Utilities Act	)	
	)	
Illinois Commerce Commission	)	
on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR	)	
Gas Company	)	
	)	
Reconciliation of Revenues collected under	)	
Gas Adjustment Charges with Actual Costs	)	
prudently incurred	)	

**MEMORANDUM OF LAW IN SUPPORT OF  
VERIFIED MOTION FOR RULING ON USE OF DISCOVERY DEPOSITIONS**

Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor Gas” or the “Company”) hereby respectfully submits this Memorandum of Law in Support of its Verified Motion for Ruling on Use of Discovery Depositions in this proceeding.

**I.  
Summary of Argument**

Depositions are not ordinary discovery in Commission proceedings. They are extraordinary discovery (*see* 83 ILCS § 200.340) and as infrequent in Commission practice as

the forum's stated policy to discourage depositions implies. The purposes for which discovery depositions may be used in the evidentiary record and the procedural protections related to such use are not issues regularly addressed in this forum. Nonetheless, in this proceeding, these issues present themselves with great urgency at this juncture.

As the Administrative Law Judges (the "ALJs") are aware, Nicor Gas at Staff's request agreed to and facilitated numerous discovery depositions in this proceeding. All active parties participated in the depositions, including Staff, the Citizens Utility Board ("CUB"), and the Cook County State's Attorney's Office ("Cook County").<sup>1</sup> The stated purpose for the discovery depositions was to assist Staff's (and the Intervenors') development of factual information related to the Gas Cost Performance Program (the "GCPP") previously operated by the Company, which is the primary subject matter of this consolidated docket.

Staff's and the Intervenors' pre-filed direct testimony is due on November 21, 2003. These parties have stated that they do not intend to offer factual evidence in their pre-filed testimony but, rather, only expert opinions. (*See, e.g.,* Mot. Hr'g Tr., Oct. 29, 2003). Nicor Gas has no objection *a priori* to these parties' use of information obtained in the discovery depositions in support of their witnesses' expert opinions. If such use marked the limits of these parties' plans for the discovery depositions, the Company would not be seeking a ruling at this juncture. Certain parties, however, have informed the Company that they intend to include verbatim excerpts from the deposition transcripts within their witnesses' pre-filed testimony and/or to attach portions of the transcripts as evidentiary exhibits.

The admission of the discovery deposition transcripts through Staff's and the Intervenors' expert witnesses would be in error. Illinois evidence law, as adopted by the Commission,

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<sup>1</sup> CUB and Cook County, collectively, are referred to herein as the "Intervenors."

differentiates sharply between the use of inadmissible hearsay—*i.e.*, facts and data obtained in a discovery deposition—as the basis for expert testimony, on the one hand, and the literal introduction of hearsay statements as evidence in a party’s case. By failing to recognize this fundamental distinction, the submission of pre-filed expert testimony by Staff or the Intervenor which seeks to admit the discovery depositions, whether in whole or in part, raises grave concerns for the integrity of the process and the record in this proceeding.

A fair process and a record based upon competent evidence are in all parties’ interest. Further unwanted motion practice in this proceeding and possibly extensive objections at hearing are not. Accordingly, Nicor Gas proposes for the ALJs’ consideration the limited procedures outlined below for use of the discovery depositions by the parties.

1. Witnesses offering expert opinions shall not include direct quotations from the discovery depositions in their pre-filed written testimony. Such witnesses are not precluded from referencing facts or data obtained from the discovery depositions and identifying the source of such information in support of their opinions.
2. Facts or data obtained from the discovery depositions referenced in support of a witness’s expert opinions are subject to objection. In the event such supporting information is deemed inadmissible, even for the limited purpose offered, it will be stricken from the witness’s testimony.
3. In the event an adverse witness is examined at hearing, and the witness has given a discovery deposition in this proceeding, the deposition may be used for appropriate purposes, including impeachment or rehabilitation, subject to objection.

As demonstrated below, these proposed procedures are fully supported by law and consistent with Commission practice. If implemented at this time, they will help ensure a fair and efficient process and a determination on the merits. For this reason, Nicor Gas seeks expedited briefing and hearing on this Motion with a ruling to issue before Staff and the Intervenor submit their witnesses’ pre-filed testimony on November 21, 2003.

## II. Background On Discovery Depositions

Depositions and other formal discovery procedures are discouraged in Commission proceedings. 83 Ill. Admin. Code § 200.340. Nonetheless, as a show of good faith and in the interest of full disclosure, Nicor Gas agreed to and facilitated thirteen (13) depositions of current and former employees during June and July of this year. All active parties participated in the depositions. Staff selected the deponents, who included Nicor Gas's Chief Executive Officer and senior executives and managers. The examinations were conducted explicitly as discovery depositions and *not* as evidence depositions. Staff sought and received leave from the ALJs to take the depositions on this basis and designated each deposition as a discovery deposition at the outset of the examination.<sup>2</sup> The deposition transcripts total more than two-thousand-five-hundred (2,500) pages.

In September, counsel for Staff and the Intervenors informed Company counsel that these parties intended to use the discovery depositions directly in their witnesses' pre-filed testimony. In support of such use, Staff counsel asserted that the discovery deposition transcripts should be treated no differently from "ordinary" written discovery in Commission proceedings (*i.e.*, data request responses), and on this basis, according to Staff counsel, could be included without limitation directly in pre-filed testimony. Nicor Gas counsel objected to the characterization of the discovery depositions as ordinary discovery under the Commission's Rules and to their direct use in any party's pre-filed testimony.<sup>3</sup> On several occasions during September and October, counsel for Nicor Gas and various parties discussed the proposed direct use of the discovery

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<sup>2</sup> See Staff's Motions for Leave to Conduct Discovery Depositions, filed on May 30, 2003 and July 22, 2003.

<sup>3</sup> Nicor Gas counsel further objected to the direct use of the transcripts in these parties' pre-filed testimony, because the depositions were taken as discovery depositions, *not* evidence depositions, and the underlying examinations were conducted on that basis and with that understanding.

depositions in Staff's and the Intervenor's pre-filed testimony. These discussions, while in good faith, did not produce an agreed procedure for use of the discovery depositions.

### **III.** **Applicable Legal Standards**

The discovery depositions are classic hearsay. The out-of-court statements they contain are inadmissible in evidence, including in the administrative setting, absent an exception to the hearsay rule. *See Jackson v. Bd. of Review of Dep't of Labor*, 105 Ill. 2d 501, 504, 475 N.E.2d 879, 883 (1985); *Grand Liquor Co., Inc. v. Dep't of Revenue*, 67 Ill. 2d 195, 199, 367 N.E.2d 1238, 1240 (1977); *Novick v. Dep't of Finance*, 373 Ill. 342, 344, 26 N.E.2d 130, 131 (1940). Certain exceptions to the hearsay rule are available under the Commission's Rules and other applicable evidentiary law. *See* 83 Ill. Admin. Code § 200.610(b); 5 ILCS 100/10-40(a); *see also* Fed. R. Evid. 703. These exceptions are narrowly construed to protect against the admission of unreliable and/or prejudicial evidence. *See In re Commonwealth Edison Co.*, Docket No. 90-0038, 1990 WL 508139, at \*18 (Ill. Comm. Comm'n December 12, 1990). The purpose for which the proponent seeks to offer the out-of-court matter directly affects the availability and the scope of such hearsay exceptions. This latter question forms the crux of the issue presented for determination on the Company's Motion.

#### **A. Hearsay Information May Be Used To Support Expert Opinion Testimony Before The Commission Subject To Limitations**

Even though classic hearsay, facts or data obtained from the discovery depositions are not necessarily inadmissible in this proceeding in the form of pre-filed testimony, if used for the limited purpose of supporting a party witness's expert opinions. Such use, however, does not contemplate the direct admission of untested hearsay statements from the deposition transcripts as, in effect, substantive evidence.

Modern legal practice allows the limited use of hearsay information by a witness to support her expert testimony in the interest of judicial economy. *See Wilson v. Clark*, 84 Ill. 2d 186, 193-96, 417 N.E.2d 1322, 1326-27 (1981), *cert. denied* 454 U.S. 836, 102 S. Ct. 140 (1981) (adopting Fed. R. Evid. 703 as Illinois law); *see also City of Chicago v. Anthony*, 136 Ill. 2d 169, 185-86, 554 N.E.2d 1381, 1389 (1990). The practice reflects the inescapable reality that expert witnesses generally have no first-hand knowledge of the facts of the cases in which they are offering opinion testimony. *Id.* By allowing them to rely upon non-evidentiary materials to form opinions, the practice expedites proceedings by avoiding the otherwise time-consuming process of a party calling witnesses solely for the purpose of authenticating and admitting often voluminous materials (including some or all of the discovery in a complex case) on which its experts have relied. *Id.*

While the rules of evidence apply in administrative proceedings, the Commission also has promulgated Rule 200.610(b) as a “catch-all” exception to the hearsay rule. 83 Ill. Admin. Code 200.610(b); *see* 5 ILCS 100/10-40(a). Under Rule 200.610(b), hearsay information may be admitted in support of a witness’s expert opinion, subject to limitations, in much the same manner as in the circuit courts. *See Metro Utility v. Ill. Commerce Comm’n*, 193 Ill. App. 3d 178, 184-86, 549 N.E.2d 1327, 1331-32 (2d Dist. 1990) (admission of hearsay in form of letter prepared by another state agency was not in error because witness reasonably relied upon the information to form his expert opinion).

Whether before the Commission or the courts, reliance on hearsay in expert testimony does not obviate the protections of the hearsay rule. *City of Chicago*, 136 Ill. 2d at 185-86, 554 N.E.2d at 1389; *accord In re Commonwealth Edison Co.*, Docket No. 90-0038, 1990 WL 508139, at \*18 (Rule 200.610(b) to be narrowly construed). In either setting, hearsay used to form an expert's opinion will not be admitted absent a showing that (1) the information is of a

type customarily relied upon and reasonably trustworthy, and (2) the probative value of the evidence in explaining the expert's opinion substantially outweighs its likely prejudicial impact or tendency to create confusion.<sup>4</sup> See *City of Chicago*, 136 Ill. 2d at 185-86, 554 N.E.2d at 1389; *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 770-72, 771 N.E.2d 1030, 1036-38 (1st Dist. 2002); *In re Commonwealth Edison Co.*, Docket No. 90-0038, at \*18 (excluding hearsay in expert testimony on prejudice grounds).

The determination of whether to admit the hearsay matter is discretionary. See 83 Ill. Admin. Code § 200.500 (concerning ALJs' authority). Outside the above-described parameters, however, admission of hearsay matter in support of expert opinion testimony is reversible error. *Rios*, 331 Ill. App. 3d at 770-72, 771 N.E.2d at 1036-38. Critically, if such hearsay is admitted through an expert's opinion, it is not and cannot be relied upon as substantive evidence. *City of Chicago*, 136 Ill. 2d at 185-86, 554 N.E.2d at 1389; *Rios*, 331 Ill. App. 3d at 770-72, 771 N.E.2d at 1036; *In re Commonwealth Edison Co.*, Docket No. 90-0038, at \*18.

Based on the foregoing, Staff's and the Intervenor's proposed use of the discovery deposition transcripts directly in their witnesses' pre-filed testimony is contrary to the intent and application of Rule 610(b) and related evidentiary law. It should not be allowed.

First, the literal deposition transcripts are unreliable. Whether information elicited in the deposition examinations can be considered reliable for purposes of forming Staff's and the Intervenor's witnesses' expert opinions is an open question, which the ALJs need not pre-judge. By necessity, however, the deposition transcripts offer a biased presentation of the subject matter addressed. This bias would be exacerbated further by the use of selected quotations from the

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<sup>4</sup> Even if the hearsay matter is deemed inadmissible and is not disclosed to the finder-of-fact, the expert's testimony is not necessarily invalidated, if the hearsay matter meets minimal reliability standards, and it is the witness's opinion—and not the underlying hearsay—that is being offered. See, e.g., *Metro Utility*, 193 Ill. App. 3d at 184-86, 549 N.E.2d at 1331-32).

deposition transcripts in the record. The fundamentally one-sided nature of a discovery deposition led the Alaska Public Utility Commission to strike deposition transcripts offered by a party in evidence, stating that the use of information “gleaned” from such discovery in pre-filed testimony is the proper practice.<sup>5</sup> *In re Matter of Tariff Revision*, Docket No. U-01-108, 2002 Alas. PUC LEXIS 469, at \* 6-11 (Alaska Pub. Util. Comm’n Sept. 24, 2002). The same result should obtain here.

*Second*, the use of literal excerpts from the deposition transcripts in Staff’s and the Intervenor’s pre-filed testimony presents a high likelihood of prejudice and confusion. By presenting selected quotations from the discovery depositions through their witnesses’ expert testimony (rather than properly relying upon the underlying information to explain these witnesses’ opinions), the parties create significant potential for confusion of the record as to the purpose for which such information is being offered. Notably, selected excerpts from the depositions easily could be mistaken for substantive evidence (*e.g.*, admissions), although they are not and cannot be considered as such in the expert context. The Illinois Appellate Court’s decision in *Rios* is instructive in this respect. *See* 331 Ill. App. 3d 770-72, 771 N.E.2d at 1036-38. In that case, discovery deposition testimony admitted through an expert witness was repeatedly and improperly referenced in argument to the fact finder, as if it were affirmative evidence in the case, resulting in reversal. *Id.* Certainly, it is in all parties’ interest to avoid the possibility of such error here.

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<sup>5</sup> As the Alaska Public Utility Commission noted, the one-sided presentation of issues in a discovery deposition results in no small part because the examination takes place outside the evidentiary protections of the hearing room. *Id.* The reliability of the transcribed testimony further is compromised because the fact-finder is not present at the discovery examination and, thus, is unavailable to observe the deponent’s demeanor, to cross-examine the deponent, or otherwise to assess the credibility of the exam. *Id.* In this respect, Staff’s contention that the discovery depositions in this proceeding should be treated as “ordinary” written discovery fails.



**B. Hearsay Is Generally Inadmissible Outside The Expert Context  
In Commission Practice**

Outside a supporting role in pre-filed expert testimony, Commission practice provides narrow opportunities for the proper use of hearsay in the record. While Rule 200.610(b) provides an independent basis for admission of hearsay in Commission proceedings, which is unavailable in the circuit courts, the rule does not operate to open a floodgate to unreliable hearsay statements. *See In re Commonwealth Edison Co.*, Docket No. 90-0038, 1990 WL 508139, at \*18; *see also Jackson v. Bd. of Review of Dep't of Labor*, 105 Ill. 2d at 504, 475 N.E.2d at 883; *Grand Liquor Co.*, 67 Ill. 2d at 199, 367 N.E.2d at 1240; *Novick*, 373 Ill. At 344, 26 N.E.2d at 131; *see also* 2 Am. Jur. 2d Admin. Law § 348 n. 29 (stating that “[i]n Illinois, hearsay evidence is generally inadmissible in administrative hearings unless it satisfies the requirements of an exception to the rule excluding hearsay”). Nonetheless, in the specific case of discovery depositions, it is not unreasonable to conclude that such hearsay could be used, subject to objection, on cross-examination for purpose of impeaching the testimony of the deponent, as an admission by a party, its officer, or agent, or as otherwise provided by Illinois evidence law.<sup>6</sup> Ill. Sup. Ct. R. 212.

**IV.  
Proposed Procedures For Use Of Discovery Depositions**

1. Witnesses offering expert opinions shall not include direct quotations from the discovery depositions in their pre-filed written testimony. Such witnesses are not precluded from referencing facts or data obtained from the discovery depositions and identifying the source of such information in support of their opinions.

As previously noted, Nicor Gas has no objection *a priori* to use of facts or data obtained from the discovery depositions in support of Staff's and the Intervenor's witnesses' pre-filed

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<sup>6</sup> Because Ill. Sup. Ct. Rule 212 deals with the use of discovery depositions in evidence, the rule reasonably falls within the scope of the Rule 200.610(b), which adopts Illinois' rules of evidence in Commission proceedings. *See* 83 Ill. Admin. Code § 200.610(b). In any event, Ill. Sup. Ct. Rule 212 is persuasive authority.

testimony. These parties have stated unequivocally that they do not intend to offer factual evidence in this proceeding (*see* Mot. Hr'g Tr., Oct. 29, 2003) and, therefore, their only possible use of the discovery depositions in pre-filed testimony would be in support of their witnesses' expert opinions. In discussions with Nicor Gas counsel, certain party counsel have recognized, at least in principle, the fundamental distinction made by the law between the use of information obtained in discovery depositions and the presentation of selected deposition excerpts in the evidentiary record. By addressing this limited question at this point in the proceeding, the ALJs will preserve all parties' rights to make use of information developed in the discovery depositions, subject to applicable law, while preventing damage to the evidentiary record. Under these circumstances, Nicor Gas submits that the procedure outlined above is fair to all concerned and consistent with applicable law.

2. Facts or data obtained from the discovery depositions referenced in support of a witness's expert opinions are subject to objection. In the event such supporting information is deemed inadmissible, even for the limited purpose offered, it will be stricken from the witness's testimony.

In the event Staff and the intervenors properly restrict their use of the discovery depositions in their pre-filed testimony to information supporting their witnesses' expert opinions, objections to the admission of such hearsay information can be addressed within the current procedural schedule. The ALJs previously set a date of April 2, 2004 for the parties to file pre-hearing motions with a hearing on the motions, as needed, on April 8, 2004. For this reason, the procedure proposed above is efficient, customary in Commission practice, and fair to all concerned.

3. In the event an adverse witness is examined at hearing, and the witness has given a discovery deposition in this proceeding, the deposition may be used for appropriate purposes, including impeachment or rehabilitation, subject to objection.

Finally, counsel for Staff and the Intervenors have stated that they intend to call adverse witnesses at hearing in this matter.<sup>7</sup> If an adverse witness is allowed, who has given a discovery deposition in this proceeding, Nicor Gas does not object *a priori* to the use of that witness's discovery deposition on examination, although the Company reserves the right to object at hearing to improper use. Nicor Gas further notes that by calling adverse witnesses at hearing, who previously have been deposed, Staff and the Intervenors negate any argument for use of verbatim excerpts from the deposition transcripts in their witnesses' pre-filed testimony. Such use would be cumulative and inappropriate where the witness is available. Thus, the above-described procedure is consistent with applicable law and Commission practice.

## **V. Conclusion**

Nicor Gas, without objection, facilitated numerous discovery depositions in this proceeding in the interest of compromise and full disclosure. Just as the parties have had occasion to obtain this extraordinary discovery, they also have the obligation to use the discovery depositions in a manner that is responsible and consistent with binding law. Staff's and the Intervenors' unilateral determination to include verbatim excerpts from the discovery depositions in their witnesses' pre-filed expert testimony does not meet this obligation. As shown above, the limited procedures proposed by Nicor Gas for the use of the discovery depositions will protect all parties' interest in a fair and efficient proceeding and in development of a record based upon competent evidence. For these reasons, Nicor Gas respectfully prays the ALJs to grant its Verified Motion for Ruling on Use of Discovery Depositions.

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<sup>7</sup> The applicable law and appropriate Commission practice associated with calling such witnesses is addressed in Nicor Gas's Verified Motion to Compel Discovery From Staff of the Illinois Commerce Commission, Citizens Utility Board and Cook County State's Attorney's Office and/or to Establish Procedure For Identification of and Objection to Adverse Witnesses.

Dated: November 7, 2003

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY  
D/BA/ NICOR GAS COMPANY

By: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I, Thomas A. Andreoli, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas's Memorandum of Law in Support of Verified Motion for Ruling on Use of Discovery Depositions upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on November 7, 2003.

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Thomas A. Andreoli